

MICHAEL LEHNERS, ESQ.
429 Marsh Ave.
Reno, Nevada 89509
Nevada Bar Number 003331
(775) 786-1695

Ed 3/22/10

Attorney for Creditor
Philip DiGirolamo

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

oOo

IN RE

PAUL M. PIERCE and ROSALIE ANN
PIERCE,

Debtor(s).

BK-N- 10-50420

CHAPTER 7

Hearing Date: 5-26-10

and Time: 10:00 am

Mtn No. _____

Est Time: 5 Minutes

MOTION TO ABANDON PROPERTY OF
THE ESTATE

COMES NOW, Creditor, Philip DiGirolamo, by and through his attorney, Michael Lehnern, Esq., and files the following motion to abandon property of the estate pursuant to 11 U.S.C. §554. This motion is made and based upon the pleadings on file herein and the Memorandum of Points and Authorities attached hereto.

MEMORANDUM OF POINTS AND AUTHORITIES

This is a sad case. It deals with a mentally ill individual, and the family which took advantage of him. It is sad because Philip DiGirolamo was forced to sue his family. It is sad because Rosalie Pierce engaged in unconscionable conduct which cost Phillip his inheritance.

Philip DiGirolamo is a dependent adult, as that term is defined by the California Welfare & Institutions Code §15610.23. He is also a disabled person as that term is defined by the California Civil Code Section 1761(g).

1 Angelo DiGirolamo was the trustee of the Joseph Salmeri Trust. Rosalie
2 Pierce was an independent fiduciary of Philip DiGirolamo under California law.
3 This relationship arose out of her parent-child relationship of trust and confidence
4 with Phillip, her position as an agent of the Trustee, Angelo DiGirolamo, and her
5 admitted role in holding and distributing the assets of The Trust for the benefit of
6 Phillip.

7 Ms. Pierce breached her fiduciary duties owed to Phillip by her failure to
8 distribute assets of The Trust to which he was entitled to receive, by her financial
9 abuse of a dependent adult, as that term is defined by the California Welfare &
10 Institutions Code, and by actual fraud.

11 Specifically, Ms. Pierce breached her fiduciary duties owed to Phillip by
12 purchasing real property for her own benefit with money belonging to The Trust.
13 As a direct and proximate result of Rosalie Pierce's breach of fiduciary duties,
14 defalcation and fraud, the Superior Court of California awarded judgment against
15 Rosalie Pierce in the amount of \$654,048.78 on October 5, 2009. This judgment was
16 exemplified and recorded in the Lyon County Recorder's Office on January 21, 2010
17 as Document No. 453630. A true and correct copy of this recorded judgment has
18 been attached hereto as Exhibit "1".

19 On December 28, 2009 the Superior Court of California amended the
20 Judgment. A true and correct copy of the Amended Judgment has been attached
21 hereto as Exhibit "2". The only difference is that the latter judgment alters the
22 constructive trust language with respect to the Debtors' home in Fernley.

23 The October 5, 2009 Judgment provided:

24 "In light of the fact that defendant Rosalie Pierce purchased three
25 houses in Fernley, Nevada with money belonging to the Trust,
26 Rosalie Pierce holds title to these three properties as constructive
27 trustee of plaintiff Philip DiGirolamo.

28 Id at Page 2, Lines 15-17.

The December 28, 2009 Judgment contains the following language.

1 "Nevertheless, because defendant Rosalie Pierce and her husband,
2 Paul Pierce, used some Trust money to purchase, as joint tenants,
3 three houses located at 975 Aster Lane, 1408 Red Bluffs Way and 1565
4 Reese River, in Fernley, Nevada, Rosalie Pierce and her husband,
5 Paul Pierce, hold title to these three properties as constructive trustee
6 of plaintiff Philip DiGirolamo, subject to Paul Pierces community
7 property interest, if any, in these three properties."

8 Id at Page 2, Lines 24-28.

9 The California Court made additional findings which are of note in this case:

10 1. The Court finds that plaintiff Philip DiGirolamo is a dependent adult,
11 as that term is defined by Welfare & Institutions Code § 15610.23, and that plaintiff
12 is therefore entitled to the rights afforded to him by the Elder Abuse and
13 Dependent Adult Civil Protection Act ("EADACPA"), Welfare & Institutions Code §
14 15600, et seq., including § 15610.30 and § 15657.5. The Court further finds that
15 plaintiff is a disabled person, as that term is defined by Civil Code Section 1761(g).
16 *December 28, 2009 Judgment, Page 2, Lines 3-8*

17 2. Rosalie Pierce was the agent of Angelo DiGirolamo under Probate
18 Code § 16401(b). Angelo DiGirolamo is jointly and severally liable for the breaches
19 and tortious acts of Rosalie Pierce due to his actions in directing the agent's
20 performance in refinancing the Monterey property and disbursing proceeds of the
21 Trust; his delegation of fiduciary duties; his failure to exercise prudence in selecting
22 an agent; his failure to review the agent's performance; and his failure to take
23 reasonable steps to compel the agent to carry out the terms of the Trust as they
24 relate to Philip DiGirolamo, a Trust beneficiary. *December 28, 2009 Judgment, Page 2,*
25 *Lines 10-16.*

26 3. The Court finds that Rosalie Pierce is also an independent fiduciary of
27 the Philip DiGirolamo due to her parent-child relationship of trust and confidence
28 with the plaintiff; her position as an agent of the trustee; and her admitted role in
holding and distributing the assets of the Trust for Philip's benefit. *December 28,*
2009 Judgment, Page 2, Lines 17-20.

Law

11 U.S.C. §554(b) provides as follows:

On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

In the case at bar, the Debtors have scheduled the real property located at 975 Aster Lane, Fernley Nevada as their residence. It is valued at \$130,000.00. There is a mortgage for \$46,009.69. They have claimed the equity in this property exempt under Schedule "C".

The Debtors have also scheduled real property located at 1408 Red Bluff Way, Fernley, Nevada. There is no equity in this property. This motion concerns only the Aster Lane property.

The third property mentioned in the Judgment has been foreclosed upon, and is no longer property of the Debtors.

The California Superior Court order makes it clear that neither the Aster Lane nor the Red Bluff Way property are vested in the Debtors. 11 U.S.C. §541(d) states:

"Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

Here, the Debtors hold the Aster Lane and Red Bluff Way property in trust on behalf of Philip DiGirolamo. This means Mr. DiGirolamo has the right to proceed in state court to obtain possession of this property. However, the state court will not recognize his efforts to take possession of this property without an order from this Court. See In re Gruntz, 202 F.3d 1074 (9th Cir. 2000) holding state courts cannot strip federal courts of jurisdiction on core issues.

1 Impact on the debtor is not one of the factors to be considered in authorizing
2 abandonment. In re Johnston, 49 F.3d 538, (9th Cir. 1995). In that case, the Trustee
3 wanted to abandon real property which was going to be foreclosed upon. The
4 foreclosure would create a two million dollar tax gain for the debtor if it were
5 abandoned. The debtor objected to abandonment. The Court held that any impact
6 upon the debtor is not to be considered in a motion to abandon. *Id* at 539.

7 In the case at bar, the focus must be on the estate's interest in the property
8 itself. With respect to the Red Bluff property, there is no equity according to the
9 Debtors' schedules. Therefore, the Trustee cannot administer it for the benefit of
10 unsecured creditors.

11 With respect to the Aster Lane property, Mr. DiGirolamo is the beneficiary of
12 a constructive trust. Because the California judgment was recorded in Lyon County
13 prior to the filing of this bankruptcy, it placed the Trustee on constructive notice of
14 Phillip DiGirolamo's interest in the property. Therefore, the Trustee has no right to
15 avoid Mr. DiGirolamo's interest in the property.

16 While federal law governs the right of a trustee to avoid interests in
17 property as a hypothetical bonafide purchaser, state law controls whether the
18 trustee's status as a bona fide purchaser defeats the rights of the person against
19 whom the trustee seeks to assert his powers. Deuel v. Taxel 594 F.3d 1073 (9th Cir.
20 2010); In re Professional Inv. Properties of America, 955 F.2d 623, (9th Cir. 1992).

21 In Nevada, to claim BFP status, a purchaser must show, inter alia, that the
22 conveyance of legal title was made without notice of outstanding equities. Hewitt
23 v. Glaser Land & Livestock Co., 626 P.2d 268, 97 Nev. 207, (Nev. 1981), citing Brophy
24 M. Co. v. B. & D. M. Co., 15 Nev. 101 (1880).

25 In the case at bar, the California judgment was recorded in Lyon County on
26 January 21, 2010. The instant bankruptcy was filed on February 12, 2010. Mr.
27 DiGirolamo's constructive trust was of public record at that time. This judgment
28

1 specifically states that Rosalie Pierce holds three properties in Fernley, Nevada in
2 trust. This is sufficient to generate inquiry notice.

3 In conclusion, Ms. Pierce has stolen her son's inheritance and placed the
4 money in these Fernley properties. Mr. DiGirolamo has the right to take possession
5 of them as the beneficiary of this constructive trust. Because the judgment was
6 recorded prior to the filing of the bankruptcy, the Trustee cannot avoid this interest
7 under 11 U.S.C. §544(a). The property is of no benefit to the estate and it should be
8 abandoned so Mr. DiGirolamo can take possession of it.

9 Dated: This 19 day of March, 2010


10
11 By: 
12 Michael Lehnert, Esq.
13 429 Marsh Ave.
14 Reno, Nevada 89509
15 Nevada Bar Number 003331
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Exhibit 1

Exhibit 1

APN# 022-152-04

01/21/2010 04:53 PM

Official RecordRequested By
BRUCE BLAKELY ESQ

Lyon County - NV

Mary C. Milligan - Recorder

Page 1 of 10 Fee: \$23.00

Recorded By: CDL RPTT:



0453630

Recording Requested by:Name: Bruce W. Blakely, ESQ.Address: 9591 Redwood Hwy Ste. 2275City/State/Zip: Mill Valley, CA 94941**Mail Tax Statements to:**Name: Legal Owner

Address: _____

City/State/Zip: _____

Foreign Judgement and Notice**Title of Document**

(Required Field)

FILL IN ALL THAT APPLY:**The Undersigned Hereby Affirms That This Document Submitted For Recording Contains Personal Information As Required By Law*:**

Specify Law* _____

Signature _____

Specify Law* _____

Print Name _____

Title _____

*If there is no applicable State or Federal Law, Personal Information must be removed prior to recording.

If this document is a re-record or correction, fill out below:

Correcting Document#: _____ Amending: _____

Reason for re-record: _____

(For Re-records, all pages from original document must be included, \$25 Non-conforming Fee Applies)

If legal description is in metes & bounds, indicate where it was obtained:

_____ (Document Title), Book _____ Page _____ or

Document # _____ recorded _____ (date) in the

Lyon County Recorder's Office.

-OR-

If prepared by a surveyor, provide name and address:

Personal information means a natural person's first name or first initial and last name in combination with any one or more of the following data elements:

1. Social security number.
2. Driver's license number or identification card number.
3. Account number, credit card number or debit card number, in combination with any required security code, access code or password.

This page added to provide additional information required by NRS 111.312 Sections 1-4.
(\$1.00 Additional Recording Fee Applies)

CASE NO. : 10 00 00005 18
DEPT NO. : II

REC'D & FILED

2010 JAN 11 PM 1:18

ALAN GLOVER

CLERK
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

* * *

PHILIP DiGIROLAMO,

Plaintiff,

vs.

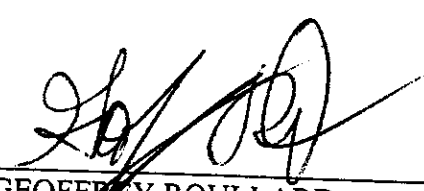
ROSALIE A. PIERCE, PAUL PIERCE,
ANGELO CHRISTOPHER DiGIROLAMO,
INDIVIDUALLY AND IN HIS CAPACITY AS
TRUSTEE OF THE JOSEPH SALMERI
TRUST, and DOES 1-20,

Defendants.

NOTICE OF FILING OF FOREIGN
JUDGMENT

Please take notice that on the 11th, day of January, 2010, an Exemplified copy of Judgment for Plaintiff Following Court Trial, case number RG08407865 filed October 5, 2009 in the Superior Court of California, County of Alameda, Unlimited Jurisdiction; entitled: PHILIP DiGIROLAMO, Plaintiff v. ROSALIE A. PIERCE, PAUL PIERCE, ANGELO CHRISTOPHER DiGIROLAMO individually and in his capacity as trustee of the JOSEPH SALMERI Trust, and Does 1-20, Defendants, was filed in the above entitled Court, along with an Affidavit of Plaintiff in Support of Enforcement of Judgment.

Dated this 11th day of January, 2010.


GEOFFREY ROULLARD
STATE BAR NO. 000388
321 NORTH WALSH STREET
CARSON CITY, NV 898701
(775) 883-1005
NEVADA ATTORNEY FOR
PHILIP DiGIROLAMO

CERTIFICATE OF MAILING

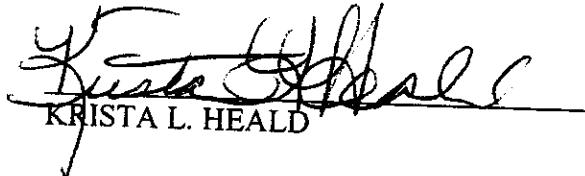
Pursuant to NRCP 5(b), I hereby certify that I am an employee of GEOFFREY ROULLARD, ESQ., over 18 years of age, and not a party to, nor interested in, the within action; that on this date, I caused to be mailed a true and correct copy of the Notice of Filing of Foreign Judgment, Affidavit of Philip DiGirolamo in Support of Enforcement of Judgment and the Exemplified Foreign Judgment, enclosed in a sealed envelope upon which certified mail, return receipt was fully paid, addressed as follows:

John R. Coniglio, Esq.
Law Office of John R. Coniglio
490 Calle Principal
Monterey, CA 93940

Rosalie Pierce
975 Aster Lane
Fernley, NV 89408

Angelo DiGirolamo
35 Hawthorne Street
Salinas, CA 93901

Executed on this 11th day of January, 2010.


KRISTA L. HEALD

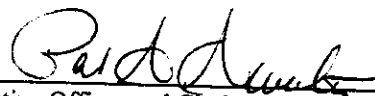
CERTIFICATE OF EXEMPLIFICATION

STATE OF CALIFORNIA,}
COUNTY OF ALAMEDA} SS

CLERK'S CERTIFICATE OF ATTESTATION

I, PAT S. SWEETEN, Executive Officer and Clerk of the Superior Court of the State of California in and for the County of Alameda, do hereby certify the annexed copy of the **JUDGMENT FOR PLAINTIFF FOLLOWING COURT TRIAL (FILED ON 10/5/09)** to be a correct copy of the original thereof, now remaining in and forming a part of the records of the office of said Clerk.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court, at Oakland, in the County of Alameda, State of California, NOV 16 2009 2009.

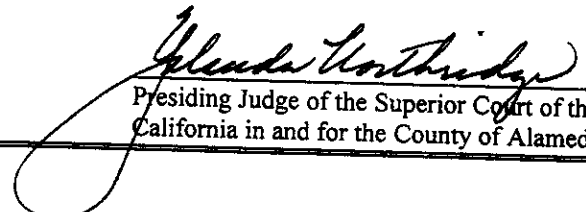

Executive Officer and Clerk of the Superior Court of
The State of California in and for the County of Alameda.

STATE OF CALIFORNIA,}
COUNTY OF ALAMEDA} SS

CERTIFICATE OF JUDGE

I, YOLANDA NORTHRIDGE, Presiding Judge of the Superior Court of the State of California in and for the County of Alameda, do hereby certify that PAT S. SWEETEN, who signed the foregoing Certificate of Attestation, now is and was at the time of the signing and sealing of the said Certificate, the duly appointed Executive Officer and Clerk of Court of the State of California in and for the County of Alameda; that she was the legal keeper of the records and seal of said Superior Court; that her signature, as it appears signed to the said Certificate of Attestation, is her genuine signature; that the seal affixed to said certificate of Attestation is the seal of said Superior Court, and that the attestation is in due form of law and by the proper officer.

In witness whereof I have hereunto set my hand and caused the seal of said Superior Court to be affixed at Oakland, in the County of Alameda, State of California, NOV 16 2009 2009.

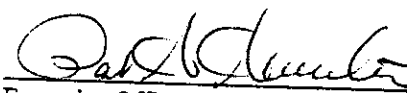

Presiding Judge of the Superior Court of the State of
California in and for the County of Alameda.

STATE OF CALIFORNIA,}
COUNTY OF ALAMEDA} SS

CERTIFICATE OF CLERK

I, PAT S. SWEETEN, Executive Officer and Clerk of the Superior Court of the State of California in and for the County of Alameda, do hereby certify that YOLANDA NORTHRIDGE, who signed the foregoing Certificate, now is, and was at the time of the signing and sealing of the said Certificate, Presiding Judge of the Superior Court of the State of California in and for the County of Alameda, duly commissioned and qualified; that said Superior Court is a court of record of the State of California and has a seal; that the seal affixed to the foregoing certificate is the seal of said Superior Court and that the signature of said Judge, as it appears signed to the said certificate, is her genuine signature.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court, at Oakland, in the County of Alameda, State of California, NOV 16 2009 2009.


Executive Officer and Clerk of the Superior Court of
The State of California in and for the County of Alameda.



SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

PHILIP DiGIROLAMO,
Plaintiff,
vs.

CASE NO. RG08407865

JUDGMENT FOR PLAINTIFF
FOLLOWING COURT TRIAL

ROSALIE A. PIERCE, PAUL PIERCE,
ANGELO CHRISTOPHER DiGIROLAMO,
INDIVIDUALLY AND IN HIS CAPACITY
AS TRUSTEE OF THE JOSEPH SALMERI
TRUST, and DOES 1-20,
Defendants.

FILED
ALAMEDA COUNTY

OCT - 5 2009

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

The case of Philip DiGirolamo v. Rosalie A. Pierce, Paul Pierce, and Angelo Christopher DiGirolamo, individually and in his capacity as Trustee of the Joseph Salmeri Trust, Case Number RG 08407865, came on regularly for trial in Dept. 607 of the Alameda County Superior Court, the Honorable George C. Hernandez, Jr., Judge, presiding, commencing on Friday, September 4, 2009. The Court, having considered the documentary and testamentary evidence presented, the arguments and briefs of counsel and the law, and good cause appearing therefor, issues this Judgment in favor of plaintiff, Philip DiGirolamo, and against defendants Rosalie A. Pierce and Angelo Christopher DiGirolamo, individually and in his capacity as Trustee of the Joseph Salmeri Trust and each of them.

The Court finds that plaintiff Philip DiGirolamo is a dependent adult, as that term is defined by Welfare & Institutions Code § 15610.23, and that plaintiff is therefore entitled to the rights afforded to him by the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"), Welfare & Institutions Code § 15600, et seq., including § 15610.30 and § 15657.5. The Court further finds that plaintiff is a disabled person, as that term is defined by Civil Code Section 1761(g).

JUDGMENT FOR PLAINTIFF FOLLOWING COURT TRIAL

1 The Court finds that Angelo DiGirolamo was and is the trustee of the Joseph Salmeri
2 Trust (the "Trust"). Rosalie Pierce was the agent of Angelo DiGirolamo under Probate Code §
3 16401(b). Angelo DiGirolamo is jointly and severally liable for the breaches and tortious acts of
4 Rosalie Pierce due to his actions in directing the agent's performance in refinancing the
5 Monterey property and disbursing proceeds of the Trust; his delegation of fiduciary duties; his
6 failure to exercise prudence in selecting an agent; his failure to review the agent's performance;
7 and his failure to take reasonable steps to compel the agent to carry out the terms of the Trust as
8 they relate to Philip DiGirolamo, a Trust beneficiary.

9 The Court finds that Rosalie Pierce is also an independent fiduciary of the Philip
10 DiGirolamo due to her parent-child relationship of trust and confidence with the plaintiff; her
11 position as an agent of the trustee; and her admitted role in holding and distributing the assets of
12 the Trust for Philip's benefit.

13 The Court does not find that defendant Paul Pierce was a co-conspirator of Rosalie Pierce
14 and Angelo DiGirolamo.

15 In light of the fact that defendant Rosalie Pierce purchased three houses in Fernley,
16 Nevada with money belonging to the Trust, Rosalie Pierce holds title to these three properties as
17 constructive trustee of plaintiff Philip DiGirolamo.

18 The Court does not find by a preponderance of the evidence, that Joseph Salmeri had
19 more than \$182,110 in his bank accounts at the time of his death.

20 The Court finds that Angelo DiGirolamo and Rosalie Pierce and each of them, jointly and
21 severally, are liable to plaintiff Philip DiGirolamo for breach of fiduciary duty, failure to
22 distribute trust assets owing to plaintiff, financial abuse of a dependent adult and actual fraud.

23 Defendants Angelo DiGirolamo and Rosalie Pierce are each liable to plaintiff Philip
24 DiGirolamo in the following amounts:

25 (1) For breach of fiduciary duty in the principal sum of \$327,024.39 in economic
26 losses, such sum to be doubled under Probate Code § 859 due to defendants' actions in
27 wrongfully taking, concealing, and/or disposing of property belonging to a beneficiary of a trust,
28 for a total judgment in the amount of \$654,048.78 on that claim;

JUDGMENT FOR PLAINTIFF FOLLOWING COURT TRIAL

1 (2) For failure to distribute trust assets owing to Philip DiGirolamo in the principal
2 sum of \$327,024.39 such sum to be doubled under Probate Code § 859 for a total judgment in
3 the amount of \$654,048.78 on that claim;

4 (3) For financial abuse of a dependent adult, as defined by Welfare & Institutions
5 Code § 15610.30, in the amount of \$327,024.39 in economic losses. The Court does not find by
6 clear and convincing evidence that defendants, and each of them, have engaged in recklessness,
7 oppression, fraud and malice in committing financial abuse under Welfare & Institutions Code §
8 15657.5(b).

9 (4) For constructive fraud in the principal sum of \$327,024.39, such sum to be
10 doubled under Probate Code § 859, for a total judgment in the amount of \$654,048.78 on that
11 claim; and

12 (5) For actual fraud, including intentional fraud, concealment of material facts, and
13 false promise, due to defendants' actions in advising plaintiff that he would only be paid his
14 inheritance if he executed a deed transferring title to the Monterey property to Rosalie Pierce, in
15 falsely advising and promising plaintiff that he would be paid his inheritance upon sale of the
16 Terry Street property, and in falsely advising plaintiff that he would lose his Social Security
17 benefits if he received an inheritance, among other false representations and promises; and due to
18 defendants' actions in fraudulently concealing facts defendants were obligated to disclose, all of
19 which representations and concealments upon which plaintiff reasonably and justifiably relied,
20 for a judgment in the principal sum of \$327,024.39.

21 The Court does not find by clear and convincing evidence that defendants have engaged
22 in oppression, fraud and malice, as defined in Civil Code § 3294(c). Plaintiff is therefore not
23 entitled to recover punitive damages.

24 Probate Code Section 15657.5(a) provides that the Court shall award to plaintiff
25 attorney's fees in any case in which the Court determines that a defendant is liable for financial
26 abuse under Welfare & Institutions Code § 15610.30. In light of defendants' financial abuse of
27 the plaintiff, Philip DiGirolamo is entitled to recover his attorney's fees by post-trial motion.
28

JUDGMENT FOR PLAINTIFF FOLLOWING COURT TRIAL

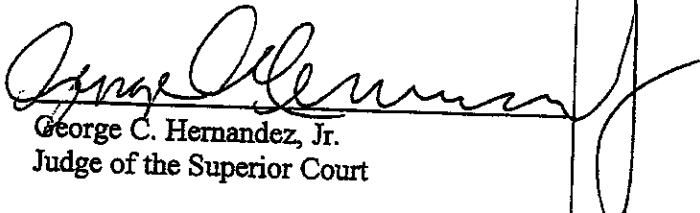
1 The Court expressly finds that the judgment herein against defendants Angelo
2 DiGirolamo and Rosalie Pierce, and each of them, is for fraud and defalcation of fiduciary
3 duties.

4 Let judgment be entered in favor of plaintiff Philip DiGirolamo, and against defendants
5 Rosalie A. Pierce, and Angelo Christopher DiGirolamo, jointly and severally, in the sum of
6 \$654,048.78; and plaintiff shall recover attorney's fees in an amount to be determined by post-
7 trial motion.

8 Plaintiff shall set his motion for recovery of attorney's fees on the Court's Law and
9 Motion Calendar.

10 IT IS SO ORDERED.

11
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13 Dated: 10/5/09


George C. Hernandez, Jr.
Judge of the Superior Court

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JUDGMENT FOR PLAINTIFF FOLLOWING COURT TRIAL

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing JUDGMENT to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

Bruce W. Blakely
FLAXMAN & BLAKELY
Shelterpoint Business Center
591 Redwood Highway, Suite 2275
Mill Valley, CA 94941

John R. Coniglio
Law Offices of John R. Coniglio
490 Calle Principal
Monterey, CA 93940

I declare under penalty of perjury that the same is true and correct.
Executed on October 6, 2009.

By: 

Yolanda Estrada, Deputy Clerk
Department 607

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Date: January 20, 2010
Alan Glover, City Clerk and Clerk of the First Judicial District
Court of the State of Nevada, in and for Carson City.

By [Signature] Deputy

Per NRS 239 Sec. 6 the SSN may be redacted, but in no way affects the legality of the document.

IN RE PIERCE, PAUL M. & PIERCE, ROSALIE ANN

Debtor(s)

Case No. _____

(If known)

SCHEDULE A - REAL PROPERTY

Except as directed below, list all real property in which the debtor has any legal, equitable, or future interest, including all property owned as a cotenant, community property, or in which the debtor has a life estate. Include any property in which the debtor holds rights and powers exercisable for the debtor's own benefit. If the debtor is married, state whether the husband, wife, both, or the marital community own the property by placing an "H," "W," "J," or "C" in the column labeled "Husband, Wife, Joint, or Community." If the debtor holds no interest in real property, write "None" under "Description and Location of Property."

Do not include interests in executory contracts and unexpired leases on this schedule. List them in Schedule G - Executory Contracts and Unexpired Leases.

If an entity claims to have a lien or hold a secured interest in any property, state the amount of the secured claim. See Schedule D. If no entity claims to hold a secured interest in the property, write "None" in the column labeled "Amount of Secured Claim."

If the debtor is an individual or if a joint petition is filed, state the amount of any exemption claimed in the property only in Schedule C - Property Claimed as Exempt.

DESCRIPTION AND LOCATION OF PROPERTY	NATURE OF DEBTOR'S INTEREST IN PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION	AMOUNT OF SECURED CLAIM
SINGLE FAMILY RESIDENCE AT 975 ASTER LANE, FERNLEY, NV	Fee Simple	J	130,000.00	46,009.69
SINGLE FAMILY RESIDENCE LOCATED AT 1408 RED BLUFF WAY, FERNLEY, NV	Fee Simple	C	150,000.00	193,951.32
TOTAL			280,000.00	

(Report also on Summary of Schedules)

Exhibit 2

Exhibit 2

BRUCE W. BLAKELY [SBN 106832]
FLAXMAN & BLAKELY
Shelterpoint Business Center
591 Redwood Highway, Suite 2275
Mill Valley, CA 94941
Telephone: (415) 381-6650
Facsimile: (415) 381-4301

Attorney for Plaintiff
Philip DiGirolamo

ENDORSED
FILED
ALAMEDA COUNTY

DEC 28 2009

CLERK OF THE SUPERIOR COURT

By J. Hidalgo Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

PHILIP DiGIROLAMO,
Plaintiff,

vs.

ROSALIE A. PIERCE, PAUL PIERCE,
ANGELO CHRISTOPHER DiGIROLAMO,
INDIVIDUALLY AND IN HIS CAPACITY
AS TRUSTEE OF THE JOSEPH SALMERI
TRUST, and DOES 1-20,
Defendants.

CASE NO. RG08407865

**AMENDED JUDGMENT FOR
PLAINTIFF FOLLOWING COURT
TRIAL**

The case of Philip DiGirolamo v. Rosalie A. Pierce, Paul Pierce, and Angelo Christopher DiGirolamo, individually and in his capacity as Trustee of the Joseph Salmeri Trust, Case Number RG 08407865, came on regularly for trial in Dept. 607 of the Alameda County Superior Court, the Honorable George C. Hernandez, Jr., Judge, presiding, commencing on Friday, September 4, 2009. The Court, having considered the documentary and testamentary evidence presented, the arguments and briefs of counsel and the law, and good cause appearing therefor, issues this Judgment in favor of plaintiff, Philip DiGirolamo, and against defendants Rosalie A.

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1 Pierce and Angelo Christopher DiGirolamo, individually and in his capacity as Trustee of the
 2 Joseph Salmeri Trust and each of them.

3 The Court finds that plaintiff Philip DiGirolamo is a dependent adult, as that term is
 4 defined by Welfare & Institutions Code § 15610.23, and that plaintiff is therefore entitled to the
 5 rights afforded to him by the Elder Abuse and Dependent Adult Civil Protection Act
 6 ("EADACPA"), Welfare & Institutions Code § 15600, et seq., including § 15610.30 and §
 7 15657.5. The Court further finds that plaintiff is a disabled person, as that term is defined by
 8 Civil Code Section 1761(g).

9 The Court finds that Angelo DiGirolamo was and is the trustee of the Joseph Salmeri
 10 Trust (the "Trust"). Rosalie Pierce was the agent of Angelo DiGirolamo under Probate Code §
 11 16401(b). Angelo DiGirolamo is jointly and severally liable for the breaches and tortious acts of
 12 Rosalie Pierce due to his actions in directing the agent's performance in refinancing the
 13 Monterey property and disbursing proceeds of the Trust; his delegation of fiduciary duties; his
 14 failure to exercise prudence in selecting an agent; his failure to review the agent's performance;
 15 and his failure to take reasonable steps to compel the agent to carry out the terms of the Trust as
 16 they relate to Philip DiGirolamo, a Trust beneficiary.

17 The Court finds that Rosalie Pierce is also an independent fiduciary of the Philip
 18 DiGirolamo due to her parent-child relationship of trust and confidence with the plaintiff; her
 19 position as an agent of the trustee; and her admitted role in holding and distributing the assets of
 20 the Trust for Philip's benefit.

21 The Court does not find that defendant, Paul Pierce, was a co-conspirator of Rosalie
 22 Pierce and/or Angelo DiGirolamo. The Court does find that Paul Pierce owed no duty to
 23 Plaintiff and breached no duty to Plaintiff.

24 Nevertheless, because defendant Rosalie Pierce and her husband, Paul Pierce, used some
 25 Trust money to purchase, as joint tenants, three houses located at 975 Aster Lane, 1408 Red
 26 Bluffs Way and 1565 Reese River, in Fernley, Nevada, Rosalie Pierce and her husband, Paul
 27 Pierce, hold title to these three properties as constructive trustee of plaintiff Philip DiGirolamo,
 28 subject to Paul Pierce's community property interest, if any, in these three properties.

1 The Court does not find by a preponderance of the evidence, that Joseph Salmeri had
2 more than \$182,110 in his bank accounts at the time of his death.

3 The Court finds that Angelo DiGirolamo and Rosalie Pierce and each of them, jointly and
4 severally, are liable to plaintiff Philip DiGirolamo for breach of fiduciary duty, failure to
5 distribute trust assets owing to plaintiff, financial abuse of a dependent adult and actual fraud.

6 Defendants Angelo DiGirolamo and Rosalie Pierce are each liable to plaintiff Philip
7 DiGirolamo in the following amounts:

8 (1) For breach of fiduciary duty in the principal sum of \$327,024.39 in economic
9 losses, such sum to be doubled under Probate Code § 859 due to defendants' actions in
10 wrongfully taking, concealing, and/or disposing of property belonging to a beneficiary of a trust,
11 for a total judgment in the amount of \$654,048.78 on that claim;

12 (2) For failure to distribute trust assets owing to Philip DiGirolamo in the principal
13 sum of \$327,024.39 such sum to be doubled under Probate Code § 859 for a total judgment in
14 the amount of \$654,048.78 on that claim;

15 (3) For financial abuse of a dependent adult, as defined by Welfare & Institutions
16 Code § 15610.30, in the amount of \$327,024.39 in economic losses. The Court does not find by
17 clear and convincing evidence that defendants, and each of them, have engaged in recklessness,
18 oppression, fraud and malice in committing financial abuse under Welfare & Institutions Code §
19 15657.5(b).

20 (4) For constructive fraud in the principal sum of \$327,024.39, such sum to be
21 doubled under Probate Code § 859, for a total judgment in the amount of \$654,048.78 on that
22 claim; and

23 (5) For actual fraud, including intentional fraud, concealment of material facts, and
24 false promise, due to defendants' actions in advising plaintiff that he would only be paid his
25 inheritance if he executed a deed transferring title to the Monterey property to Rosalie Pierce, in
26 falsely advising and promising plaintiff that he would be paid his inheritance upon sale of the
27 Terry Street property, and in falsely advising plaintiff that he would lose his Social Security
28 benefits if he received an inheritance, among other false representations and promises; and due to

1 defendants' actions in fraudulently concealing facts defendants were obligated to disclose, all of
2 which representations and concealments upon which plaintiff reasonably and justifiably relied,
3 for a judgment in the principal sum of \$327,024.39.

4 The Court does not find by clear and convincing evidence that defendants have engaged
5 in oppression, fraud and malice, as defined in Civil Code § 3294(c). Plaintiff is therefore not
6 entitled to recover punitive damages.

7 Welfare & Institutions Code Section 15657.5(a) provides that the Court shall award to
8 plaintiff attorney's fees in any case in which the Court determines that a defendant is liable for
9 financial abuse under Welfare & Institutions Code § 15610.30. In light of defendants' financial
10 abuse of the plaintiff, Philip DiGirolamo is entitled to recover his attorney's fees by post-trial
11 motion.

12 The Court expressly finds that the judgment herein against defendants Angelo
13 DiGirolamo and Rosalie Pierce, and each of them, is for fraud and defalcation of fiduciary
14 duties.

15 Let judgment be entered in favor of plaintiff Philip DiGirolamo, and against defendants
16 Rosalie A. Pierce, and Angelo Christopher DiGirolamo, jointly and severally, in the sum of
17 \$654,048.78; and plaintiff shall recover attorney's fees in an amount to be determined by post-
18 trial motion.

19 Plaintiff shall set his motion for recovery of attorney's fees on the Court's Law and
20 Motion Calendar.

21 IT IS SO ORDERED.

22
23 Dated: _____

24 George C. Hernandez, Jr.
Judge of the Superior Court

25 Approved As To Form:
26 _____

27 John R. Coniglio
28 Attorney for Defendants, Rosalie A. Pierce,
Paul Pierce, Angelo Christopher DiGirolamo

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